Supreme Court, U. S.
FILED
OCT 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, *et al.*,
Appellees.

On Appeal From The Supreme Court Of California

APPENDIX TO JURISDICTIONAL STATEMENT

LOUIS E. GOEBEL
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
Telephone: (714) 236-1414
Counsel for Appellant

October, 1979

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

Page

APPENDIX A:

(1) Findings of Fact and Conclusions of Law of the San Diego County Superior Court, dated April 9, 1976 ..... A-1

(2) Judgment of the San Diego County Superior Court, dated October 8, 1976 ..... A-11

APPENDIX B:

Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 13, 1978 ..... B-1

APPENDIX C:

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District, Division One, dated June 13, 1978 ..... C-1

APPENDIX D:

Notice of Hearing Granted by the California Supreme Court, dated July 13, 1978 ..... D-1

APPENDIX E:

Retransfer Order of the California Supreme Court, dated June 14, 1979 ..... E-1

APPENDIX F:

Agins v. City of Tiburon 24 Cal.3d 266 (1979) F-1

TABLE OF CONTENTS (Continued)

Page

APPENDIX G:

Unpublished Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 26, 1979 ..... G-1

APPENDIX H:

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District, Division One, dated July 9, 1979 ..... H-1

APPENDIX I:

Denial of Petition for Hearing by California Supreme Court, dated August 22, 1979 ..... I-1

APPENDIX J:

Notice of Appeal J-1

APPENDIX K:

(1) Constitutional Provisions K-1

(2) Statutes K-2

(3) Ordinances and Resolutions K-8

APPENDIX A

(1) **Findings of Fact and Conclusions of Law of the San Diego County Superior Court, dated April 9, 1976**

(2) **Judgment of the San Diego County Superior Court, dated October 8, 1976**

FILED
Robert D. Zumwalt, Clerk
APR 9 1976
BY S. KENDALL, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	NO. 357022 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on January 19, 1976, in Department 26 of the above-entitled Court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff, San Diego Gas & Electric Company, and C. Alan Sumption appeared as counsel for defendant, City of San Diego, a municipal corporation.

The matter having been previously bifurcated to require trial of the question of liability first and a jury having been demanded by plaintiff, the Court heard argument and received briefs on the question of entitlement of plaintiff to a jury in the liability phase of the trial. The matter was submitted to the Court for decision, and the Court determined that the plaintiff was not entitled to a jury in the liability phase, but was entitled to a jury for the damage phase.

The liability phase proceeded without a jury. Witnesses were sworn and evidence, both oral and documentary, was introduced. The evidence in the liability phase being closed, and the question of liability having been submitted to the Court for decision, and, after deliberation thereon, the Court now renders its decision in writing and makes the following Findings of Fact and Conclusions of Law on the question of liability:

FINDINGS OF FACT

1. Plaintiff San Diego Gas & Electric Company is a corporation with its principal place of business in San Diego County, California, and is the legal owner of the real property which is the subject of this action.

2. The defendant City of San Diego is a municipal corporation possessing the power of eminent domain.

3. In April of 1966, plaintiff acquired approximately 412 acres of property in the Sorrento Valley area of the City of San Diego as an assemblage after extensive negotiation. The portion of this property located south of Carmel Valley Road and west of Interstate 5 is the subject of this action and is the property acquired by plaintiff in April of 1966, except that portion east of Sorrento Valley Road and the 12 acres west of the railroad right of way and which is graphically described in Exhibit "A", attached hereto and made a part hereof by this reference.

4. Approximately 25 acres of the subject property was acquired from the defendant City at fair market value of approximately $5,200 per acre.

5. The northwesterly portion of the subject property is subject to tidal action from the Pacific Ocean and is sometimes referred to as the

Los Penasquitos Lagoon. A great portion of the subject property is not subject to tidal action nor salt water intrusion, although it is subject to fresh water ponding in the wet season. There exists only sparse vegetation on the property. It is presently and has been since 1966 vacant except for some utility lines which traverse it.

6. In 1966, approximately 116 acres of the subject property was zoned M-1-A (industrial), and most of the balance was zoned A-1-1 (agricultural holding).

7. The General Plan of the City of San Diego, first adopted in 1967, designated almost all of the subject property for industrial use, and this designation has been reaffirmed consistently with the last readoption in January of 1972.

8. In 1966, considerable industrial development had taken place in the Sorrento Valley area immediately to the southeast of the subject property, and this development continued apace through 1973 and to the present so that the industrial development is substantially filled out up to the subject property.

9. In the late 1960's, a proposed plan of lands in the City which might be acquired for open space was prepared by the Planning Department of the defendant City, and a portion of the subject property was included therein.

10. On March 16, 1972, a conference meeting of the San Diego City Council was held on the subject of open space. Particular reference was made to the acquisition of open space and a bond issue was discussed. A motion was passed directing the Planning Director and the City Attorney to proceed to determine a schedule of those open space areas which they felt they could proceed to rezone.

11. In July of 1972, the City Council held another conference on the subject of open space and specifically discussed an open space bond issue for the November, 1972, election.

12. On August 10, 1972, the City Council of the defendant City initiated a rezoning of the subject property from M-1-A to A-1-10, or other appropriate zone.

13. The open space bond issue on the November, 1972, ballot failed.

14. In late 1972 or very early in 1973, the Planning Department of the defendant City commenced preparing an open space element to the City's General Plan as required to be adopted by State law by June 30, 1973. The draft open space element designated a portion of the subject property which was then zoned M-1-A as open space for public acquisition.

15. At the same time, the Community Development Department of the defendant City was carrying out detailed planning for the funding of open space acquisition, and specific estimated costs of acquisition of specific properties were being estimated. This effort was in preparation for another open space bond issue scheduled for the September, 1973, municipal election. One estimate reported was the acquisition of 120 acres of the subject property for a cost of $900,000.00.

16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and

newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

17. On April 11, 1973, the Planning Commission of the defendant City held a public hearing on the proposed rezoning of the subject property, and the Planning Commission recommended down-zoning of a portion of the subject property, approximately 39 acres, from M-1-A to A-1-10, but recommended that a substantial portion, approximately 77 acres, remain M-1-A, and that a further segment, approximately 50 acres, remain A-1-1, but be considered for future industrial use on submission of a specific plan for development.

18. On May 16, 1973, the Planning Commission of the defendant City held its first public hearing on the new open space element to the City's General Plan which was entitled, "A Plan for the Preservation of Natural Parks for San Diego". Plaintiff and others had only received the proposed plan less than 24 hours before the hearing, and, accordingly, a continuance was requested and ultimately granted to May 23, 1973. The plan as submitted proposed to designate only the northerly portion of the subject property as open space.

19. At the May 16, 1973, hearing, M. David Smith of the Planning Department, and James McLaughlin of the Community Development Department, compared notes and determined that the plan proposed by the Planning Department did not conform to the plans being developed in the Community Development Department for use in conjunction with the bond issue. Mr. Smith had been previously instructed by his superiors to conform the Planning Department's open space efforts to those of the Community Development Department. Accordingly, Mr. Smith directed his associate, Mr. Stang, to coordinate with the Community Development Department and to make the open space element designations conform to those of the Community Development Department for acquisition by bond issue.

Mr. Stang did so and revised the large wall exhibit maps which were on display at the Planning Commission hearing. The effect of the revision as to the subject property was to include all of the subject property except that east of Sorrento Valley Road and the 12 acres west of the railroad right of way. However, there was not sufficient time before the next hearing to reprint the maps contained in each report which had been submitted to the Planning Commission and to the public. Accordingly, they were left in their existing form.

20. On May 23, 1973, the continued hearing on the open space element was held before the Planning Commission. No mention was made on the public record that the wall exhibits had been altered, and plaintiff was totally unaware that the change had been made and of its impact with respect to the subject property. The open space element was adopted by the Planning Commission in the form presented.

21. On May 30, 1973, the City Council of the defendant City held another Council conference and received the report from the Community Development Department regarding the bond issue. The efforts of the Community Development Department had culminated in a report entitled, "Staff Report, Park Reserve Systems, April 29, 1973". This report discussed the means of funding acquisition of property for open space and specifically designated substantially all of the subject property for acquisition as open space.

22. On June 7, 1973, the City Council of the defendant City accepted the recommendation of the Planning Commission and thereafter rezoned a portion of the subject property from M-1-A to A-1-10, while retaining a substantial portion in the M-1-A zone and further retaining a portion of the A-1-1 zone with a recommendation for consideration for future industrial upon submission of a specific plan for development.

23. On June 19, 1973, the City Council of the defendant City held a public hearing for adoption of the open space element to the City's General Plan. Again, individual revised maps were not prepared nor distributed. Rather, the corrected wall exhibits were displayed. The copies of the open space element which each member of the City Council and members of the public held contained the erroneous map designation. No mention of this discrepancy was made on the public record, and the open space element was adopted as presented.

24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized.

25. The September 18, 1973, bond issue failed.

26. Following the September, 1973, election, the defendant City deleted the subject property from its priority list of proposed open space acquisitions.

27. In the condition that existed prior to June of 1973, the highest and best use of the property taken was for use as an industrial park and related buffer areas.

28. In the aforesaid condition, before the actions of the defendant City in June of 1973, the property had a substantial fair market value.

29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has

further suffered severance damage with respect to the balance of the subject property.

30. No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space.

31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space.

32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property.

33. Since the actions of the defendant City in June of 1973, the property designated as open space and the remainder of the larger parcel is unmarketable in that no other person would be willing to purchase the property, and the property has at most a nominal fair market value.

CONCLUSIONS OF LAW

1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just

compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property.

2. Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property designated as open space on June 19, 1973, considered without regard to the open space designation, together with damages to the remainder parcel or parcels, together with plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees actually incurred.

TRIAL

The trial of the damage phase of this action before a jury is hereby set for May 3, 1976, at 10:00 a.m., in Department 26, San Diego County Superior Court.

DATED: APR 9 1976.

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

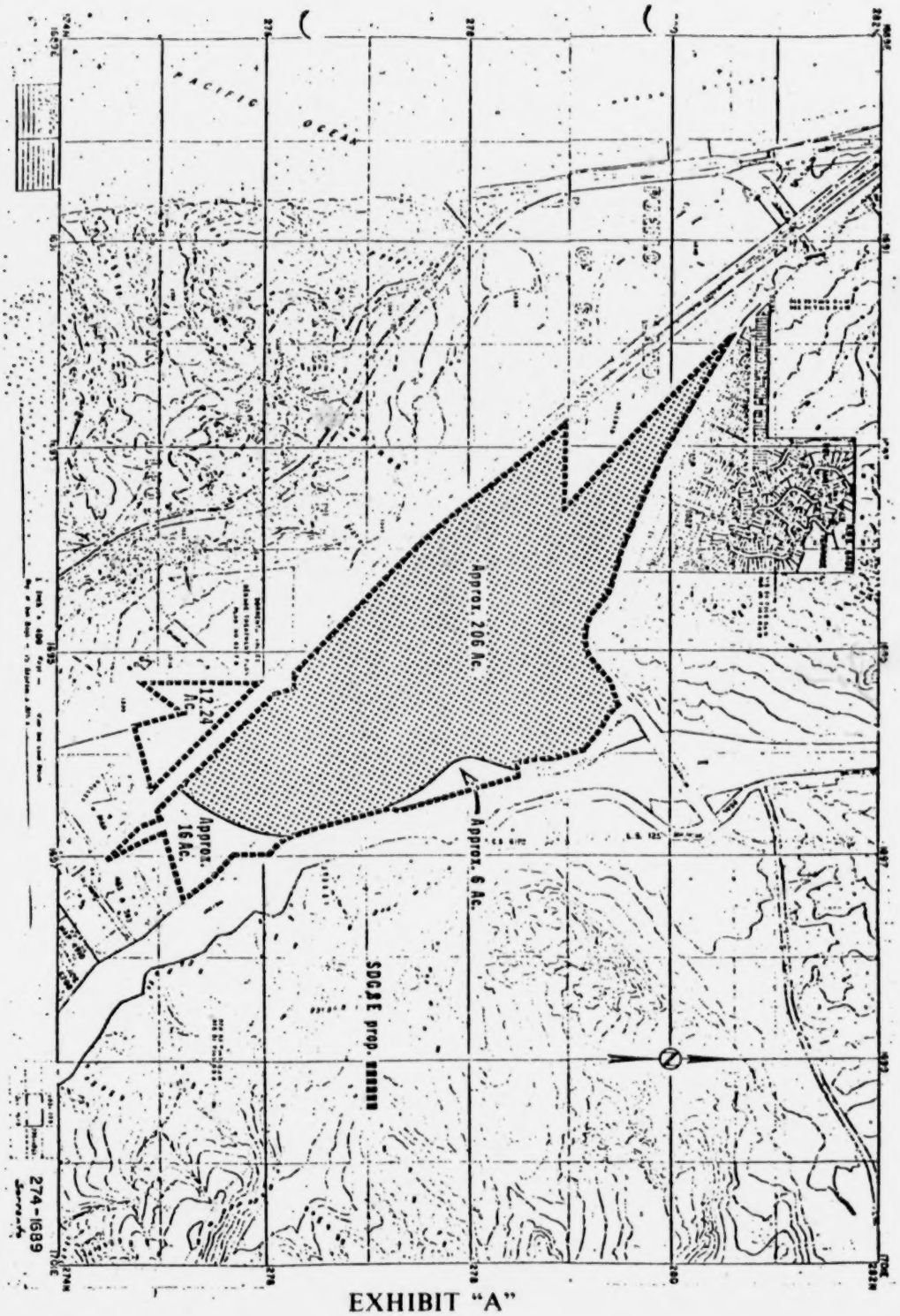
PACIFIC OCEAN
Approx. 206 Ac.
112.24 Ac.
Approx. 16 Ac.
Approx. 6 Ac.
SDG&E prop.
274-1989

EXHIBIT "A"

LAW OFFICES
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 THE BANK OF CALIFORNIA PLAZA
110 WEST A STREET
SAN DIEGO, CALIFORNIA 92101
(714) 236-1414

FILED
Robert D. Zumwalt, Clerk
OCT 8 1976
BY J. KENDALL, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation, Plaintiff, vs. CITY OF SAN DIEGO, a municipal corporation, et al., Defendants.	No. 357022 JUDGMENT IN INVERSE CONDEMNATION

This cause came on regularly to trial on January 19, 1976, in Department 26 of the above-entitled court, the Honorable Jack R. Levitt, Judge, presiding, Louis E. Goebel appeared as counsel for plaintiff SAN DIEGO GAS & ELECTRIC COMPANY, and C. Alan Sumption appeared as counsel for defendant CITY OF SAN DIEGO, a municipal corporation.

The matter had been previously bifurcated to require the question of liability to be tried to the court and the issue of just compensation being thereafter determined by the jury.

Findings of Fact and Conclusions of Law were executed and filed herein which provided, *inter alia,* that the activities of defendant CITY with respect to plaintiff's property constituted a taking of that portion of plaintiff's property described on Exhibit A attached hereto and made a part hereof by this reference, and that plaintiff was entitled to damages in the amount of the fair market value of the property taken as of June 19, 1973, and damages to the remaining lands of plaintiff.

The court having instructed the jury as to the law of the case, submitted to the jury a form of verdict and instructed the jury to ascertain and assess the fair market value of the subject property as of June 19, 1973, as their verdict in said cause. The jury retired and did consider said matter and thereafter returned into court for their verdict in said action and returned said form of verdict so submitted to them, which verdict was as follows:

> "We, the jury in the above-entitled action, find that,
>
> 1. The fair market value of the property taken is $2,886,300.00.
>
> 2. The severance damages to the remainder of plaintiff's property after acquisition are $283,696.00."

Said verdict was then and there, on May 20, 1976, duly entered and filed, and the court having made its Findings of Fact and Conclusions of Law as to all other matters, questions and issues involved in the proceeding;

And it further appearing to the court that the use to which the property was taken and is to be applied is a use authorized by law, and that the taking of the same is necessary to such use; and that the taking of the property occurred on June 19, 1973;

NOW, THEREFORE, by reason of the law in the premises and the evidence of the verdict aforesaid,

IT IS HEREBY ORDERED AND ADJUDGED that the value of plaintiff's real property taken by defendant, as fixed by the jury, was on June 19, 1973, the sum of $2,886,300.00, together with damages to the remainder of plaintiff's property, after severing from said property the part taken, in the amount of $283,696.00, for the total amount of $3,169,996.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover interest on said amount of $3,169,996.00 at the legal rate of seven percent (7%) per annum from and after June 19, 1973 to the date of entry of judgment;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is entitled to and does hereby recover its appraisal fees in the amount of $41,094.53; its engineering fees in the amount of $41,779.54; and its attorneys' fees in the amount of $39,685.00;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff recover its costs of suit herein;

IT IS FURTHER ORDERED AND ADJUDGED that payment to the court of the sum of money specified above is in full payment for the real property so taken, and for damage to the remaining lands of plaintiff suffered by reason of the taking of the property;

IT IS FURTHER ORDERED AND ADJUDGED that the real property taken is described more particularly on Exhibit A attached hereto and incorporated herein by this reference.

DATED: OCT 8 1976

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

SORRENTO PROPERTY

Those certain portions of Pueblo Lots 1339 and 1362 of Pueblo Lands of San Diego, according to the Map thereof made my [*sic*] James Pascoe in 1870, a copy of which said map was filed in the office of the County Recorder of San Diego County November 14, 1921 and is known as Miscellaneous Map No. 36, TOGETHER with those portions of Section 30, Township 14 South, Range 3 West and Section 25, Township 14 South, Range 4 West, according to Official Plat thereof in the City of San Diego, County of San Diego, State of California, all being described as a whole as follows:

Beginning at the Northwest corner of Lot 4 of said Section 25; thence along the West line thereof, as said West line is shown on Record of Survey Map No. 6852, filed in the office of the County Recorder of said County of San Diego, South 0° 20′ 44″ West, 55.23 feet to an angle point in the Southerly line of Del Mar Terrace, according to Map thereof No. 1527, filed in the Office of the County Recorder of said County, being a point in a line which is parallel with and 20.00 feet Southerly, measured at right angles, from the Southerly line of Block 9 of said Map No. 1527; thence along said Southerly line of Map No. 1527 as follows: North 72° 59′ 37″ West, 214.41 feet (record North 73° 58′ West, 214.30 feet); North 67° 32′ 37″ West, 932.59 feet (record North 68° 31′ West, 932.10 feet) and North 60° 13′ 29″ West, 1557.71 feet (record North 61° 16′ West) to the Northeasterly line of the Pueblo Lands of San Diego, known as the Williams' line, according to City of San Diego Engineer's Drawing Nos. 5261-L to 5268-L; thence South 46° 30′ 09″ East (record South 47° 02′ 54″ East) along said Northeasterly line 2564.23 feet to the Northeasterly corner of said Pueblo Lot 1339; thence along the Northerly line thereof North 89° 00′ 29″ West, 917.53 feet to the Northeasterly line of the 150.00 foot wide right of way as conveyed to the Atchison, Topeka and Santa Fe Railway Company, a corporation, by deed dated April 21, 1909 and recorded in Book 461, Page 372 of Deeds; thence along said Northeasterly line South 38° 53′ 12″ East, 1491.02 feet to the beginning of a tangent 5654.65 foot radius curve concave Northeasterly; thence Southeasterly along the arc of said

curve through a central angle of 7° 05′ 08″ a distance of 699.29 feet; thence tangent South 45° 58′ 20″ East, 1448.01 feet to the Southerly line of said Pueblo Lot 1339; thence along said Southerly line South 89° 11′ 20″ East, 111.29 feet and South 88° 57′ 50″ East, 37.19 feet (record South 89° 07′ 59″ East, 148.48 feet) to the Westerly line of said Pueblo Lot 1362; thence along said Westerly line South 14° 28′ 47″ East, 194.43 feet to said Northeasterly line of the 150.00 foot wide right of way conveyed to Atchison, Topeka and Santa Fe Railway Company; thence along said Northeasterly line South 45° 58′ 20″ East (record North 46° 30′ 00″ West), 1545.93 feet to the Southerly line of the Northerly 50 acres of said Pueblo Lot 1362; thence along said Southerly line North 75° 33′ 21″ East, 130.46 feet to the Westerly line of the 100.00 foot wide right of way as condemned by the California Southern Railroad Company in the Superior Court of San Diego County, filed May 24, 1881 in Book 38 of Deeds, Page 438, et seq.; thence along said Westerly line South 22° 45′ 09″ East, 274.87 feet to the beginning of a tangent 2914.93 foot radius curve concave Northeasterly; thence Southeasterly along the arc of said curve through a central angle of 0° 15′ 10″, a distance of 12.86 feet to the Northeasterly line of said 150.00 foot wide right of way conveyed to Atchison, Topeka and Santa Fe Railway Company, being a point on the arc of a 5130.59 foot radius curve concave Southwesterly in said Northeasterly line, a radial line of said curve to said point bears North 45° 42′ 54″ East; thence Southeasterly along the arc of said curve through a central angle of 4° 08′ 00″, a distance of 370.12 feet to a point of cusp with a nontangent 2814.93 foot radius curve concave Northeasterly, a radial line of said curve to said point bears South 59° 51′ 51″ West, said point being a point on the Northeasterly line of said 100.00 foot wide right of way condemned by California Southern Railroad Company; thence Northwesterly along the arc of said curve and along said Northeasterly line through a central angle of 7° 23′ 00″, a distance of 362.74 feet; thence continuing along said Northeasterly line North 22° 45′ 09″ West, 260.27 feet to said Southerly line of the Northerly 50 acres of Pueblo Lot 1362; thence along said Southerly line North 75° 33′ 21″ East, 21.10 feet to a point hereinafter known and designated Point "A", said point being a point in the center line of Sorrento Valley Road; thence continuing North 75° 33′ 21″ East, 716.04 feet to the Southwesterly line of the land described in deed to the State of California, recorded August 12, 1963 as Document No. 141384 of Official Records; thence along said Southwesterly line North 38° 42′ 00″ West, 393.64 feet to an angle point therein; thence North 50° 16′

35" West, 261.96 feet; thence North 1° 04' 56" West, 56.57 feet to the Northeasterly line of said Pueblo Lot 1362, said Northeasterly line being shown on City of San Diego Engineer's Drawing Nos. 5261-L to 5268-L and known as the Williams' line; thence continuing North 1° 04' 56" West, 286.32 feet; thence North 46° 25' 56" West, 189.19 feet; thence North 22° 39' 32" West, 214.89 feet; thence North 15° 42' 27" West, 472.39 feet; thence North 13° 49' 04" West, 392.47 feet; thence North 18° 31' 25" East, 90.14 feet; thence North 15° 10' 00" West, 273.57 feet; thence North 16° 30' 35" West, 639.94 feet; thence North 14° 39' 43" West, 252.83 feet; thence North 27° 31' 06" West, 104.53 feet; thence South 76° 36' 25" West, 72.71 feet to a point herein designated Point "B" being a point in the center line of Road Survey No. 301 (Sorrento Valley Road) according to plat thereof filed in the office of the County Surveyor of said County of San Diego; thence continuing along said boundary of State of California's land South 76° 36' 25" West, 22.96 feet; thence North 10° 51' 04" West, 153.85 feet; thence North 5° 00' 03" West, 206.30 feet; thence North 16° 06' 20" West, 308.65 feet; thence North 48° 09' 57" West, 198.94 feet; thence North 58° 47' 21" West, 246.55 feet; thence North 44° 14' 18" West, 142.99 feet; thence South 69° 12' 12" West, 228.46 feet; thence South 51° 00' 15" West, 242.42 feet; thence North 39° 05' 15" West, 60.00 feet; thence North 51° 00' 22" East, 243.39 feet; thence North 50° 26' 47" East, 85.95 feet (record 57.86 feet to the North line of Lot 4 in said Section 25); thence along said North line North 88° 55' 41" West, 1117.40 feet to the Point of Beginning.

The bearings and distances used in the above description are based on Record of Survey Map No. 6852, filed in the office of the County Recorder of said County, April 26, 1967 as File No. 58393.

Excepting therefrom that portion of Lot 4 in said Section 25, lying Northerly of the center line of Carmel Valley Road, according to Road Survey No. 301, Filed in the Office of the County Surveyor of said County.

ALSO: Excepting therefrom all that portion of the above described property lying Easterly of a line, a portion of which is the center line of Sorrento Valley Road as shown on said Road Survey No. 301, more particularly described as follows:

Beginning at Point "B" described above; thence South 16° 58′ 24″ West, 388.85 feet to the beginning of a tangent curve concave Easterly, having a radius of 400.00 feet; thence Southerly along the arc of said curve through a central angle of 59° 08′ 30″, a distance of 412.89 feet; thence South 42° 10′ 06″ East, 255.16 feet; thence South 33° 01′ 36″ East, 265.00 feet; thence South 22° 01′ 36″ East, 480.00 feet; thence South 16° 09′ 36″ East, 536.00 feet to the beginning of a tangent curve concave Westerly having a radius of 573.70 feet; thence Southerly along the arc of said curve through a central angle of 30° 03′ 00″, a distance of 300.89 feet; thence tangent South 13° 53′ 24″ West, 74.40 feet to a point on the Northeasterly line of said Pueblo Lot 1362; thence South 11° 27′ 14″ West 513.61 feet; thence South 5° 52′ 08″ East, 288.83 feet; thence South 26° 18′ 29″ East, 173.50 feet to said Point "A" described above.

APPENDIX B

Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 13, 1978

SAN DIEGO GAS & ELECTRIC COMPA
NY, Plaintiff and Respondent,

v.

CITY OF SAN DIEGO et al.,
Defendants and Appellants.

Civ. 16277.

Court of Appeal, Fourth District,
Division 1.

May 17, 1978.

As Modified on Denial of Rehearing
June 13, 1978.

Hearing Granted July 13, 1978.

Electric utility sued city in inverse condemnation to recover value of property allegedly taken because down zoning combined with inclusion of tract in open space element of general plan made it impossible to use the land. The Superior Court, San Diego County, Jack R. Levitt, J., rendered judgment for the utility, and the city appealed. The Court of Appeal, Gerald Brown, P.J., held that: (1) subject to exceptions, general rule is that a rezoning which merely reduces market value does not give rise to a cause of action in inverse condemnation; (2) although charter city, which did not adopt implementing ordinances, was not bound by statute requiring zoning to be consistent with general plan, city's policy of "consistency" could be considered; (3) where combination of down zoning plus inclusion of property in open space element, plus "consistency" policy and city's overtures to purchase the property for open space deprived owner of beneficial use thereof, in that because of location and peculiar characteristics of the land it was suitable only for industrial use, which city would not permit, and had no beneficial or economic use except as open space, a compensable taking had occurred; (4) failure to apply for conditional use permit did not bar relief on theory of failure to exhaust administrative remedies since owner was not seeking to develop the land, and (5) award of prejudgment interest was not error.

Affirmed.

GERALD BROWN, Presiding Justice.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking,

June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, down-zoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone retained its industrial classification.[1] On June 19, 1973 City adopted the open space element of the General Plan which covered all the land found condemned here, about 233 acres. In September 1973, the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations

1. From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
" holding zone	

After the rezoning, the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
" holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

combined with the open space element of the general plan has made the property useless. Substantial evidence, introduced during trial, supports the Company's position.

[1] The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719, 123 P.2d 505). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

[2] In some instances the state will appropriate a person's property without paying for it in advance. This may occur in a variety of situations. The government may deliberately destroy private property in the public interest such as when it demolishes buildings to prevent the spread of fire; it may inadvertently damage property in the construction of public improvements; it may decrease the value of a person's property, for example, by constructing a freeway which cuts down light and air to a particular property; or it may decrease the value of a person's property by regulations which limit the use or development of the property. (10 Cal.Law Rev. Commission Reports, Recommendations and Studies, 1970-1971 at pp. 79-81.) In these instances the state is said to have acquired the property through inverse condemnation and the property owner can bring suit to recover the compensation due him.

[3-8] The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530, 20 Cal.Rptr. 638, 370 P.2d 342). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 514, 125 Cal.Rptr. 365, 542 P.2d 237). However, there are exceptions to the rule. For example, the state may abuse its use of the police power by placing unreasonable or arbitrary regulations on land under the guise of zoning (*Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 326, 131 Cal.Rptr. 633). A regulation may be unreasonable if it deprives the landowner of any beneficial use of his property (*Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 624, 129 Cal.Rptr. 575) or if it deprives the owner of his property so it can be used by the public (*Sneed v. County of Riverside,* 218 Cal.App.2d 205, 32 Cal.Rptr. 318). Likewise, if the state down-zones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation. Or, if zoning classifications are used to evade the requirement that land used by the public must be acquired by the public, such zoning is condemnation (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 516, fn. 14, 520, 125 Cal.Rptr. 365, 542 P.2d 237). The question whether a particular zoning restriction results in a

taking by inverse condemnation is "a question of fact to be determined by trial of the issue." (*Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628, 129 Cal.Rptr. 575, 584.) On review, the appellate court looks for substantial evidence to support the finding below (*Foreman & Clark Corp. v. Fallon,* 3 Cal.3d 875, 881, 92 Cal.Rptr. 162, 479 P.2d 362).

[9-11] When the government restricts a landowner's use of his property, it is important to determine whether it is doing so under the police power or under the power of eminent domain because this is what governs the question of compensation. However, there is no set formula to distinguish a regulation from a taking or to draw the line where regulation ends and taking begins. Cases which involve the appropriation of land by the state or use of the land by the public clearly demand the state to take title and pay for the taking; cases where the landowner is prohibited from noxious use of his land, for example as a gravel pit,[2] no compensation is due even though the landowner may be effectively prevented from all use of his land. From another point of view, where the government acts in its enterprise capacity, acquiring assets from the citizenry for its own account, as it were, then payment must be made; where the government mediates disputes among competing alternatives, such as prohibiting pigs in the backyard, it is merely regulating the private interests in the community. One commentator has suggested that the compensation clause in the Constitution never was meant to preserve the economic status quo; rather, it is to serve as a curb on arbitrary government action (Sax, *Takings and the Police Power,* 74 Yale L.J., 36, 37-40, 58, 62-63). However, these guidelines are not always of great help in answering whether a governmental action is a regulation or a taking.

[12] Stripped to its bare essentials, we are asked here whether a person with land zoned for agriculture and manufacturing but lying within the open space area of the general plan can be denied all use of his land and denied compensation. Recognizing that a downzoning, as long as it is reasonable, is not a basis for inverse condemnation, what effect does the general plan have?

[13, 14] Zoning and the general plan are closely interrelated because they both deal with land use, but each performs an essentially different function. Zoning is very precise and legally restricts present land use, while the general plan is merely a planning document which is to serve as a guide to future land use. In California general plans are mandatory (Gov.Code § 65300 et seq.); provision is made for their amendment three times a year (Gov.Code § 65361) which highlights the fact that they are not final documents--neither completed nor inflexible. San Diego's General Plan states in the legend:

> "NOTE: this map presents General Plan land use and circulation policies and proposals in a generalized,

2. *Consolidated Rock Products Co. v. City of Los Angeles, supra,* 57 Cal.2d 515, 518, 20 Cal.Rptr. 638, 370 P.2d 342.

graphic form. It is not a zoning map and should not be so construed."

Notwithstanding the differences in their purpose, scope and function, zoning and the general plan become inextricably linked by the passage of AB 1301 which mandates that zoning be consistent with the general plan (Gov.Code § 65860). At the same time, laws were passed requiring that the issuance of building permits, approval of subdivision maps and adoption of open space zoning be dependent on the proposal being consistent with the local open-space element (Gov.Code § 65567). Depending on the jurisdiction's definition of open space, it would be possible for a parcel within the open space element to be zoned light manufacturing as is the case here and still be consistent with the general plan.[3] However, the issue here should be moot since these provisions requiring consistency do not apply to charter cities such as San Diego unless the City has adopted similar ordinances. This the City has not done (Gov.Code §§ 65700, 65803; *Dale v. City of Mountain View*, 55 Cal.App.3d 101, 108, fn. 5, 127 Cal.Rptr. 520). Thus, here, the general plan should be merely a planning document and should not legally bind the City in making land use decisions.

[15-17] Because the general plan lacks definiteness and finality, there can be no claim in inverse condemnation because land falls within a certain category on an adopted plan (*Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120, 109 Cal.Rptr. 799, 514 P.2d 111). The mere "planning in anticipation of a public improvement is not a taking" (*Hilltop Properties v. State of California*, 233 Cal.App.2d 349, 356, 43 Cal.Rtpr. 605, 609). Even an announcement that an agency intends to condemn a property results in a taking only when a city does some unequivocal act which shows it is proceeding with a planned improvement (*Hilltop Properties v. State of California, supra*, 233 Cal.App.2d 349, 356, 43 Cal.Rptr. 605). However, even if a bond issue is proposed and certain properties are singled out for purchase if the bond issue passes, this is not a sufficiently unequivocal act to give rise to an action in inverse condemnation (see *City of*

3. The City's definition of open space makes it less than likely a manufacturing zone would be found consistent with open space. On the general plan "open space" is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for The City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

Walnut Creek v. Leadership Housing Systems, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[18-20] In summary, the act of downzoning is not compensable unless the regulation is unreasonable or an attempt by the government to lower the value of the land before buying it. Adoption of a general plan does not result in condemnation unless there are additional specific acts which commit the governmental agency to purchase the property. Here there is no legal requirement that the zoning be consistent with the general plan. However, a review of the record shows this was an underlying premise in the court below: expert witnesses testified there must be consistency between zoning and the general plan; counsel for the parties agreed this was the way things were done; City brings to our attention in its briefs the fact it is exempt from the consistency provisions but does not follow through to conclude that the court below made its decision under improper law.[4] As a charter city, San Diego is exempt from the requirements that building permits, subdivision maps and its acquisition and disposal of land be consistent with the open space plan unless the City adopts ordinances to that effect (Gov.Code §§ 65566, 65567, 65700). Even though the City has not adopted the necessary statutes, the City's Planning Department includes these requirements in its publication "A Plan for the Preservation of Natural Parks for San Diego." It appears the City vascillates on this question and thus has the opportunity to deny projects on the basis of inconsistency with the general plan and to deny inverse condemnation because it is not legally bound to have consistency. Although the City weakly protests in its briefs, from the record presented to this court it is clear that even though City may not have been legally bound to have its zoning consistent with its general plan, the City follows this procedure as a matter of policy. The fact that land is within the open space element and its zoning and use are subject to open space constraints, does not constitute inverse condemnation as a matter of law. As noted earlier, the determination there has been inverse condemnation through excessive regulation is a factual matter and we look for substantial evidence to support the finding.

[21, 22] The appellate court presumes the judgment is correct (*Denham v. Superior Court,* 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193) and resolves conflicts in the evidence in support of the judgment (*Nestle v. City of Santa Monica,* 6 Cal.3d 920, 925-926, 101 Cal. Rptr. 568, 496 P.2d 480). Here, the trial court found:

> "Due to the continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damage

4. Rather, City somewhat inconsistently argues there was no condemnation here because no zoning classification is inconsistent *per se* with open space.

with respect to the balance of the subject property.

"No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the . . . property, there exists no practical, beneficial or economic use of the . . . property designated as open space which is consistent with open space."

The City has not denied Company a permit to develop the land. Rather Company presented expert witnesses who testified the land could not be used for agriculture because of the soil's high salt content; it could not be used for residences because the land is in a flood plan; it could not be used economically for grazing; it could not be used for a golf course because of poor drainage. In short, the only possible use of the land was for industrial. But, there was testimony by experts that City required zoning to be consistent with the general plan; the City's definitions of open space (see fn. 3) give rise to the inference that industrial use would not be permitted in the open space area; the City's own expert testified he had never seen an industrial development that would be consistent with open space although he did not rule out the possibility entirely.[5] The clear inference is that City would deny any application for industrial development on this parcel because of the open space designation on the general plan. In addition, there was expert testimony that after the open space element was adopted, the land had no economic use and no one would buy it. This was substantial evidence to support the court's conclusion there was inverse condemnation.

[23-25] City claims Company is not entitled to relief because it did not try to get a conditional use permit nor did it establish that City would not grant a rezoning or amend the general plan. Both City and its amicus curiae say this as a failure on Company's part to exhaust its administrative remedies, a necessary prelude for the court to acquire jurisdiction (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942). Company here was trying to enjoin City from enforcing the zoning applicable to its property (see *Metcalf v. County of Los Angeles*, 24 Cal.2d 267, 268, 148 P.2d 645; *Banville v. County of Los Angeles*, 180 Cal.App.2d 563, 565, 4 Cal.Rptr. 458); or recover damages in inverse condemnation for a taking of its property. (See *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 212, 32 Cal.Rptr. 318.) As to inverse condemnation we know of no administrative agency that handles such suits; this is a matter for the courts. As to these counts, there was no failure to exhaust any administrative remedy since none existed (see *Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 484 P.2d 93). If the ordinance is allegedly

5. City's expert witness testified that a project would not be denied only because it was located within the open space zone and opined that a design for industrial use of the property could be consistent with open space although he concluded "I haven't seen one, but I think that that's possible."

void, then it is necessary to exhaust administrative remedies by seeking a variance or amendment unless it would be futile to do so (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761). The trial court said the facts here were within the exception: the land was to be acquired for open space, had been appraised and had been on the ballot for purchase; the site was included as a park in the City's plan for acquiring parks; the land because of its peculiar characteristics is not suitable for any use, and, thus, any zoning other than industrial. It is inconceivable the City would grant an amendment to the general plan when it had always intended this land would be open space, the very reason it was classified as open space. It is irrelevant whether the City would change the zoning to industrial, the only possible use of the land, in light of the substantial evidence City would not permit industrial development here. It would have been futile to seek administrative review and was unnecessary for Company to exhaust its administrative remedies in this regard.

[26, 27] City says if its acts constitute a taking, Company is not entitled to money damages but only to have the offensive regulations set aside. It contends damages are inappropriate because there has been no actual use of the land by the public and, in essence, Company has not sustained any damage.

The proper remedy depends on what acts of the City are challenged and the findings of the trial court. If the City has acted arbitrarily or discriminatorily in passing the ordinance in question, the landowner should use administrative mandate to have the ordinance changed (*HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d 508, 516 fn. 13, 125 Cal.Rptr. 365, 542 P.2d 237); if the City has enacted an unconstitutional or invalid zoning ordinance, the landowner may seek mandate, injunctive relief or declaratory relief (*Pinheiro v. County of Marin, supra*, 60 Cal.App.3d 323, 326, fn. 2, 131 Cal.Rptr. 633) and the governmental agency is immune from any tort liability (Gov.Code § 818.2; *State of California v. Superior Court (Veta)*, 12 Cal.3d 237, 245-247, 115 Cal.Rptr. 497, 524 P.2d 1281); if the zoning is valid but so harsh that it deprives the owner of all beneficial use of its land, there has been a condemnation and damages are proper (see *Eldridge v. City of Palo Alto, supra*, 57 Cal.App.3d 613, 618, 129 Cal.Rptr. 575).

Here Company claimed in one count that the zoning ordinance or the open space element was unconstitutional and void. But it never presented any evidence notice was improper or the ordinance was arbitrary. Rather, the evidence showed and the trial court found that the combination of the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space had deprived it of the beneficial use of its land. The trial court so found. This is an example of inverse condemnation and the landowner should, under the Constitution, be compensated.

[28] City says that if there was a taking and if compensation is due, the trial court erred in awarding interest from the date of the taking rather than from the date of

judgment. Code of Civil Procedure section 1255b, cited by the City, and in effect at the time suit was commenced,[6] provides in part:

"(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

"(1) The date of the entry of judgment.

"(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

"(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession."

However, former section 1255b deals with eminent domain proceedings and is not applicable here (see *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 658, fn. 11, 131 Cal.Rptr. 646, 552 P.2d 430).

[29] City says interest should be paid from the time of judgment because no one has interfered with Company's use of the property nor has there been any actual damage to the property. However, in *Holtz* it was the Transit District's removal of lateral support on adjoining property that caused structural damage to improvements on Holtz's land. The Transit District suggested there should be no prejudgment interest because Holtz was not deprived of the use of his property even though repairs were necessary. The Supreme Court responded:

"The contention that an actual taking or dispossession is required in order to justify prejudgment interest in every case lacks merit. The right to prejudgment interest in inverse condemnation accrues *as of the date the compensable taking or injury occurred without regard to the nature or scope of the compensable event.*" (Emphasis ours; *Holtz v. San Francisco Bay Area Rapid Transit Dist.*, 17 Cal.3d 648, 657, 131 Cal.Rptr. 646, 653, 552 P.2d 430, 437.)

Here Company's land became the subject of inverse condemnation when the open space element was adopted and, in turn, triggered City's policy of not allowing development of the property. There was no error in awarding prejudgment interest.

[30] City's amicus curiae, the Attorney General, is correct in saying the City's efforts to acquire Company's project by raising the money through a bond issue do not constitute precondemnation blight (see *City of Walnut Creek v. Leadership Housing Systems, supra*, 73 Cal.App.3d 611, 622, 140 Cal.Rptr. 690).

[31] City claims the trial court erred in allowing severance damages because there was no unity of use and no physical contiguity between the condemned and severed portions. Here the condemned parcel was physically separated by a road from other pieces of the Company's land: one was leased by Company and not

6. Section 1255b of the Code of Civil Procedure was repealed effective July 1, 1976 and its provisions are now contained in Code of Civil Procedure section 1268.310. Under Code of Civil Procedure section 1230.065 section 1255b would be used here.

owned in fee and the jury, in a special finding, did not award any damages due to its severance; the other parcel was suitable for industrial development and was zoned just like the piece across the street. However, the fact the two parcels were separated by a road is immaterial as long as there is access between them and the use of the land taken is not dissimilar to that of the remainder (*City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 330, 99 Cal.Rptr. 21, 491 P.2d 813). Here there was testimony the area deemed feasible for industrial development included the remainder parcel. There was no error in awarding severance damages.

[32] City argues the trial court erred when it admitted into evidence how much Company had paid for the land originally. Here there was a bifurcated trial with the court determining liability and the jury damages. In order to establish liability, Company had to show that one of its property rights had been invaded and this had directly caused injury (*Selby Realty Co. v. City of San Buenaventura, supra*, 10 Cal.3d 110, 119-129, 109 Cal.Rptr. 799, 514 P.2d 111). City contends correctly the purchase price of the land is irrelevant because a diminution in the value of the land due to a change in zoning does not result in a taking. However, it is relevant to prove the Company suffered injury. This was not error.

[33] City claims the trial court erred in admitting into evidence the testimony of two expert witnesses, each of whom said he would not have advised Company to apply for an industrial development permit because to do so would have been a waste of time and money. However, this testimony was not admitted for the purpose of showing whether City would approve or deny development; rather it was admitted to explain why Company had not tried to get a permit. This was relevant and its admission was not reversible error.

[34-36] City claims the court erred in compelling City Councilman Floyd Morrow to answer hypothetical questions at an oral deposition. The questions related to Morrow's interpretation as an expert witness of "consistency" with the general plan[7] and potential use of the subject property. City is concerned

7. In substance the three questions were:

i) In your opinion as a land use control expert, may a development plan for the subject property be denied by the City of San Diego on the sole ground that the subject property has been designated as open-space for public acquisition in the open-space element of the City's General Plan?

2) In your opinion, pursuant to Government Code § 65567, may a building permit or subdivision map be properly denied for the sole reason that the use contemplated by the permit or map is not consistent with the open-space element of the General Plan of the City?

3) In your opinion, following the City's adoption of the open-space element of the General Plan in June 1973 were there any practical, beneficial or economic uses to which the subject property could have thereafter been devoted? If so, what?

because Mr. Gallagher, an expert appraiser, relied in part on Morrow's deposition in arriving at his conclusion that the highest and best use of the property was public open space. However, City failed at the trial level to preserve this issue for appeal because it did not object to or move to strike Gallagher's testimony insofar as he relied on Morrow's deposition (see *Bardessono v. Michels,* 3 Cal.3d 780, 794, 91 Cal.Rptr. 760, 478 P.2d 480). Notwithstanding City's failure to object, the questions asked were relevant to a determination of the highest and best use of the property. It is proper to discover an expert's opinion through depositions using hypothetical questions (*Dow Chemical Co. v. Superior Court,* 2 Cal.App.3d 1, 10, 82 Cal.Rptr. 288; *Zelayeta v. Pacific Greyhound Lines,* 104 Cal.App.2d 716, 724, 232 P.2d 572). The questions posed to Morrow asked for his opinion as an expert and did not seek to trace his thought processes or motives in passing some particular piece of legislation; the argument this material was not discoverable because of a legislator's privilege is misplaced (*County of Los Angeles v. Superior Court (Burroughs),* 13 Cal.3d 721, 730-731, 119 Cal.Rptr. 631, 532 P.2d 495). Even if the order compelling answers were improper the resulting prejudice was not sufficient to cause reversible error. The answers in the deposition were only one source of information used by Gallagher in coming to his opinion; he also relied on publications put out by City, opinions of attorneys who were experts in land use matters, his personal experience in appraising other open space property and interviews with potential purchasers and developers. The trial court had the necessary information to be able to assess how much weight to give to Gallagher's testimony.

[37] City complains there is no evidence to support findings 16 and 24 which state:

"16. On April 17, 1973, the City Council of the defendant City adopted a resolution of public convenience and necessity regarding the acquisition of park reserve areas. This resolution did not contain descriptions of specific properties, but referred to a 22.5 million dollar bond issue being proposed for the September, 1973, municipal election. Subsequently, the publicity for this bond issue identified the subject property as one of the properties to be acquired, and newspaper articles appeared prior to the election with maps showing the outlines of the subject property and indicating its acquisition.

"24. Plans were finalized for inclusion of an open space bond issue on the September 18, 1973, municipal election ballot. During the campaign leading up to this election, various presentations and publicity depicted the subject property as property to be acquired for public use by designating it on various graphic representations utilized."

City says the land was only a *proposed* park site which would be purchased only *if* the bond issue passed. However, on appeal the court presumes the judgment is correct and views the evidence in the light most favorable to the prevailing party (*Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 925-926, 101

Cal.Rptr. 568, 496 P.2d 480). Here, the City's resolution, adopted April 17, 1973, established the need to acquire park reserve areas "to be subsequently identified" as part of a bond issue on the September 1973 ballot. The property here was later identified as a component part of the park reserve system; the property appeared on a map in the San Diego Union as one which was to be acquired under the park bonding issue; it was designated for purchase in the literature given to voters. This supports the findings made by the trial court.

[38] City says there is no evidence to support findings 29 and 32 which read:

"29. The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space as previously described above, plaintiff has been deprived of all practical, beneficial or economic use of the property designated as open space, and has further suffered severance damages with respect to the balance of the subject property.

"32. Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property."

City argues there is no evidence that City would not allow Company to use the land since Company had not applied for and been denied a permit. However, as outlined earlier, Company presented evidence the property was not good for anything except industrial usage; there was an inference from the City's policy of making zoning consistent with the general plan combined with its definitions of open space and the fact it had decided to acquire properties and made overtures as to this land that City would not permit industrial development here; there was expert testimony there was no practical, beneficial or economic use to which the property could be put; there was testimony the best use of the land was public ownership as open space; there was expert testimony the land was not marketable.

[39] City says only about one-half of Company's property that was condemned was rezoned (see fn. 1). However, it was not the rezoning in itself which resulted in the taking. Rather, Company owns land which because of its peculiar geographic situation and topography has a very limited number of uses. It is the combination of this and other factors, such as zoning, general plan, the "consistency" policy, and the resolution to acquire property which led to the condemnation.

[40] City says Company's witnesses testified only as to the economic feasibility of developing the property; this City claims is merely another version of the diminution of value rule and is not a sufficient basis for inverse condemnation (*Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325, 131 Cal.Rptr. 633). The question asked is whether government regulation has deprived the owner of the beneficial use of its land. Here there was evidence Company could

not develop this land in any way. This is more than just decreasing the value of the land; it is destroying it completely.

[41] City says Company's witnesses contradict themselves when they say it would be futile to seek building approval from the City because none of the experts had that many personal experiences in trying to get permits. However, this goes to the weight of the evidence, a determination made by the fact-finder.

[42] City argues there is no evidence to support finding of fact number 31 which reads:

"31. Since June 19, 1973, the property designated as open space has been devoted to use by the public as open space."

There is no evidence of actual physical invasion of the property. However, this is exactly what the City is trying to do by acquiring the property, that is, keep it from being used. The Attorney General in its brief argues for extensive protection of the sensitive estuarine ecosystem from the harmful effects of intrusion. The objective here is to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being "used" by the public as it has been ever since the date when all the factors coalesced to effect the taking. In addition, there was expert testimony the property had been given over to public use. This was substantial evidence to support the finding.

[43] City challenges the support for and validity of Conclusion of Law #1 which states:

"1. The actions of defendant City against plaintiff's property were motivated to achieve a public purpose, namely, preservation of open space, without payment of just compensation and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property."

City says there was no evidence here that its acts were not a legitimate exercise of the police power. Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact. As noted earlier there was evidence to support a finding that Company had been deprived of all beneficial use of its land. There was evidence one city councilman had stated the city should preserve as much open space as possible through regulatory measures such as agricultural flood plain zoning to reduce acquisition costs; the City Attorney and the Planning Commission were told to prepare a list of open space areas where the City could proceed with agricultural, flood plain and/or LC (limited control) zoning; the open space maps were changed to include more of Company's land without actual notice to the Company; the City reaffirmed some zoning as industrial and changed some to

future industrial and then two weeks later placed the land in open space. This is substantial evidence to support the trial court's conclusion.

The judgment is affirmed.

COLOGNE and STANIFORTH, JJ., concur.

Rehearing denied; STANIFORTH, J., dissenting.

APPENDIX C

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District. Division One, dated June 13, 1978

C-1

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 13 1978
ERVIN J. TUSZYNSKI, Clerk
W. Delton
DEPUTY CLERK

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022)

Upon petition for rehearing, the opinion filed May 17, 1978 is modified to read in its entirety as follows:

[See Appendix B for full text]

The petition for rehearing is denied.

Staniforth, J., would grant a rehearing.

Brown
Presiding Justice

APPENDIX D

Notice of Hearing Granted by the California Supreme Court, dated July 13, 1978

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 13 1978

I have this day filed Order

HEARING GRANTED

L.A. 30386

In re: 4 Civ. *No.* 16277

San Diego Gas & Electric Co.

vs.

City of San Diego, etc. et al.

Respectfully,

G. E. BISHEL
Clerk

83322-877 10-77 3M OSP

APPENDIX E

Retransfer Order of the California Supreme Court, dated June 14, 1979

E-1

L. A. No. 30985

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SAN DIEGO GAS AND ELECTRIC COMPANY

v.

CITY OF SAN DIEGO ET AL.

The above-entitled cause is retransferred to the Court of Appeal, Fourth District, Division One, for reconsideration in light of Agins v. City of Tiburon, (1979) 23 Cal. 3d 605.

SUPREME COURT
FILED
JUN 14 1979
G. E. BISHEL, Clerk

Bird

Chief Justice

APPENDIX F

Agins v. City of Tiburon 24 Cal.3d 266 (1979)

AGINS *v.* CITY OF TIBURON
24 Cal.3d 266;

[S.F. No. 23866. Mar. 14, 1979.]

[As modified May 17, 1979.]

DONALD W. AGINS et al., Plaintiffs and Appellants, v. CITY OF TIBURON et al., Defendants and Respondents.

SUMMARY

The city in which plaintiffs owned five acres of unimproved land passed a zoning ordinance designating plaintiffs' property as a "residential planned development and open space zone." As applied to plaintiffs' five acres, the zoning meant a maximum of five one-family dwellings or a minimum of one. Plaintiffs never applied to use or improve their property following adoption of the zoning ordinance, nor did they seek or receive any definitive statement as to how many dwelling units they could build on their land. Plaintiffs filed a claim against the city in the amount of $2 million, alleging that the adoption of the ordinance completely destroyed the value of their property. The city rejected the claim, and plaintiffs filed a complaint alleging, as a first cause of action, a claim in inverse condemnation, and requesting in a second cause of action declaratory relief, asserting the ordinance was unconstitutional in that it constituted a taking of plaintiffs' property without payment of just compensation. Defendants' general demurrer to the inverse condemnation cause of action was sustained without leave to amend, while the demurrer to the declaratory relief cause of action was sustained with leave to amend. Plaintiffs declined to amend and the trial court entered a judgment of dismissal with prejudice. (Superior Court of Marin County, No. 75873, Jack L. Blaine, Temporary Judge.*)

---

*Pursuant to Constitution, article VI, section 21.

The Supreme Court affirmed. The court held that, while a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of U.S. Const., Fifth Amend., and Cal. Const., art. I, § 19, he may not elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. The court further held that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. Accordingly, since the ordinance allowed plaintiffs to build between one and five residences on their property, the court held the trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief. The court rejected plaintiffs' argument that the city's "precondemnation activities" (the authorization of studies recommending acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding), were so unreasonable as to provide a separate basis for an action for inverse condemnation. (Opinion by Richardson, J., with Bird, C. J., and Tobriner, Mosk, Manuel, and Newman, JJ., concurring. Separate dissenting opinion by Clark, J.)

OPINION

RICHARDSON, J.—We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it

is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation.

Plaintiffs own five acres of unimproved land in the City of Tiburon, Marin County. Tiburon has an area of 1,676 acres, a population of approximately 6,000, and because of its proximity to San Francisco, its aquatic facilities, temperate climate, and other geographic advantages, is a very desirable suburban residential area. Plaintiffs' real property is ridgeland, possesses views of San Francisco Bay, and was acquired by plaintiffs for residential development.

Tiburon, like every other city in California, is required by state law to prepare a general plan containing, among other things, "A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." (Gov. Code, § 65302, subd. (a).)

Routinely, the development of a general plan entails a careful examination of numerous social and economic factors. Many cites, especially those which are too small to maintain a staff of sufficient size and technical expertise to undertake such a project, seek the advice of expert consultants. The recommendations of these consultants are considered when the local governmental entity prepares its general plan.

In January 1972 Tiburon retained two private consultants, Williams & Mocine and Dean Witter & Co., Incorporated, to prepare advisory

reports. The Williams report, issued in October 1972, focused on possible land use designations and recommended that Tiburon attempt to acquire "a substantial portion of Tiburon ridge" for "open space." Plaintiffs' property was identified in the report as one of those parcels of property which were suitable for acquisition for open space. The Witter report, dated July 1972, recommended that the purchase of open space lands be financed through the issuance of $1.25 million of general obligation bonds. The subsequent resolution of the Tiburon City Council approving sale of these bonds did not specifically authorize acquisition of plaintiffs' property or directly refer to it.

By Ordinance No. 124 N.S., effective June 28, 1973, Tiburon adopted widespread zoning modifications which drew upon but did not mirror the consultants' reports. Under the ordinance, plaintiffs' land was designated "RPD-1," defined by Ordinance No. 123 N.S. as a "Residential Planned Development and Open Space Zone." The authorized uses of land so designated are (1) *one-family dwellings*, (2) open space uses, and (3) accessory buildings and accessory uses. The permissible density of buildings is "not less than .2 nor more than 1 dwelling unit per gross acre" depending on other specified provisions. As applied to plaintiffs' five acres "RPD-1" zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report.

Plaintiffs have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.S., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. On October 15, 1973, plaintiffs filed a claim against the City of Tiburon in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The city rejected the claim on November 12, 1973.

On December 4, 1973, Tiburon filed a complaint in eminent domain against plaintiffs to acquire their property, but on November 1, 1974, filed a notice of abandonment of the proceedings as then authorized by Code of Civil Procedure section 1255a, subdivision (a). (This section was repealed by Stats. 1975, ch. 1275, § 1.) The trial court entered its judgment of dismissal of the action on May 20, 1975. The city paid plaintiffs $4,500 for their necessary expenses incurred during the pendency of the action pursuant to section 1255a, subdivision (c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. The remedy was exclusive and the section did not include, as an element of damages, financial impairment during pendency of the eminent domain action of the owner's right to sell. Accordingly, there was no further cause of action available to plaintiffs by reason of the city's eminent domain proceeding.

On June 16, 1975, plaintiffs filed their complaint in the Marin County Superior Court against the City of Tiburon and Does One through Fifty alleging, as a first cause of action, a claim in inverse condemnation for $2 million damages and requesting, in a second cause of action, declaratory relief, asserting, among other things, that Ordinance No. 124 N.S. is unconstitutional in that it "constitutes a taking of [plaintiffs'] property without payment of just compensation."

Defendants' general demurrer to the first cause of action (inverse condemnation) was sustained without leave to amend. Similarly, their demurrer to the second cause of action (declaratory relief) was sustained with 10 days leave to amend. Plaintiffs declined to amend their second cause of action and plaintiffs appeal from the ensuing judgment of dismissal with prejudice.

(1a) Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of

[plaintiffs'] property without payment of just compensation" for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121), who expresses his view in this manner: "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*" (Italics added.)

We have previously pointed to the general nature of the appropriate remedy in such cases. In *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281], real parties had been granted a permit to develop their coastal lands by a regional commission. They brought suit when a permit was denied following an appeal to the California Coastal Zone Commission. We held that declaratory relief was an appropriate remedy by which to seek a declaration that a statute controlling development of coastal lands was facially unconstitutional. Further, insofar as the challenge was to the constitutionality of the act's *application* to the lands of the complaining parties, we concluded that the proper and sole remedy was administrative mandamus.

Similarly, a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. (See *Friedman* v. *City of Fairfax* (1978) 81 Cal.App.3d 667, 678 [146 Cal.Rptr. 687].) To the extent that *Eldridge* v. *City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575], is contrary, it is expressly disapproved.

(2a) There is a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution provides that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." In concert with the foregoing Fifth Amendment language article I, section 19, of the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner."

(3) "Property," in a legal sense, has been broadly defined. The United States Supreme Court has said that the term "property" is not used in "the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." (*U.S.* v. *General Motors Corp.* (1945) 323 U.S. 373, 377-378 [89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390].)

(2b) While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment.

In balancing the constitutional rights of the landowner against the legitimate needs of government we do not ignore well established precedent. In *Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393 [67 L.Ed. 322, 43 S.Ct. 158, 28 A.L.R. 1321], an injunction was sought to prevent a coal company from causing subsidence of property due to the company's underground mining activities. This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Mahon, supra,* at p. 415 [67 L.Ed. at p. 326].) It is clear both from context and from the disposition in *Mahon*, however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and the possibility of compensation was not even considered.

In *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237], we examined directly the problem of available remedies for aggrieved landowners and held that inverse condemnation does not lie in zoning actions in which the complaint alleges the mere reduction of market value, and that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging of property. In *HFH, Ltd.* we specifically noted that "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day." (P. 518, fn. 16, italics in original.) We now reach that issue.

While it is true that the land uses which were regulated in *HFH, Ltd.* were commercial, we find no reason to distinguish it on that basis from similar situations in which the regulation affects land used for residential, recreational, or other purposes, or to extend the additional relief of inverse condemnation to the owners of noncommercial property. (For a discussion of a contrary analysis which recommends the extension of a damages remedy in a noncommercial context, see Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L.J. 385, 507-511.)

We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of

people "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day. . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 386-387 [71 L.Ed. 303, 310, 47 S.Ct. 114, 54 A.L.R. 1016].)

In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].)

Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability

will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." (Hall, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L.J. 1569, 1597.)

We envisage that the availability of an inverse condemnation remedy in these situations would pose yet another threat to legislative control over appropriate land-use determinations. It has been noted that "The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses." (Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974) 26 Stan.L.Rev. 1439, 1450-1451; see also Bowden, *Legal Battles on the California Coast: A Review of the Rules* (1974) 2 Coastal Zone Management J. 273.)

Other budgetary consequences reveal themselves when the land use control is exercised by means of the initiative. "Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? The logical extension of requiring compensation for the mere enactment of a harsh zoning measure indicates that the answer would be in the affirmative. The potential for fiscal chaos would be great if this were the result." (28 Hastings L.J., *supra*, at p. 1598, italics in original.)

(1b) In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

(4a) Having clarified the nature of the remedies available to an aggrieved landowner, we now consider whether the property owners before us established their right to declaratory relief. We conclude that they did not.

(5) An ordinance which on its face results in a mere diminution in the value of property is not per se improper. In *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, we examined a change in zoning which reduced the value of property from $400,000 to $75,000. We concluded that no remedy was available for a mere decrease in the value of property. By this holding we acknowledged a practical truism which had been expressed by Justice Holmes more than 50 years ago in the *Mahon* cases: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." (*Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at p. 413 [67 L.Ed. at p. 325].)

(4b) Accepting as we must the general proposition that whether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case, we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. The ordinance before us had no such effect. According to the wording of the ordinance, of which we may take note, the RPD-1 zoning allows plaintiffs to build between one

and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented. Taking cognizance of the use which plaintiffs were entitled to make of their land the trial court was justified in finding that the ordinance did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value. The trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief.

(6) Plaintiffs also argue that the city's "precondemnation activities," those being the authorization of studies which recommended acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding, were so unreasonable as to provide a separate basis for an action for inverse condemnation. Plaintiffs err and we do not find persuasive their reliance on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal.Rptr. 1, 500 P.2d 1345], for support for their contention.

Klopping involved a plaintiff's recovery for the decline in market value as the result of an unreasonable delay in the institution of eminent domain proceedings following announcement of intent to condemn, and other unreasonable conduct prior to condemnation. In the matter before us there was no such delay or conduct. Tiburon instituted eminent domain proceedings less than six months after Ordinance No. 124 N.S. was adopted. It is manifest that general land-use planning discussions and related decision-making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a "taking" of the property under consideration. Any other conclusion would violate sound public policy.

Our appellate courts have recognized the appropriate controlling principles. "*Selby* [*supra,* 10 Cal.3d 110] made clear that *Klopping* [*supra,* 8 Cal.3d 39] was no support for a claim that planning designations constitute takings." (*Navajo Terminals, Inc.* v. *San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1, 4 [120 Cal.Rptr. 108].) As was noted in *City of Walnut Creek* v. *Leadership Housing Systems* (1977) 73 Cal.App.3d 611 [140 Cal.Rptr. 690], ". . . the inclusion of the property for public use in a general plan does not give rise to a cause of action. If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." (Pp. 622-623.)

Recognizing the constitutionally protected property interests here involved, we also accept the reasonable latitude which must be afforded public officials in the planning for an implementation of legitimate land use goals. These twin purposes will be served by preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies. However, the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

The judgment is affirmed.

Bird, C.J., Tobriner, J., Mosk, J., Manuel, J., and Newman, J., concurred.

CLARK, J., Dissenting.—"Private property may be taken *or damaged* for public use *only* when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19; italics added.) "Damage," as used in the constitutional provision, has always included

diminution in intrinsic value even when falling short of actual taking, spoilation or invasion. (*Reardon* v. *San Francisco* (1885) 66 Cal. 492 [6 P. 317].)

It must be clear to all of us that, as alleged by plaintiffs, the City of Tiburon has decided through the political process that in order to preserve its way of life and to maintain what is already among the highest residential land values in the state,[1] certain of its property owners must sacrifice use of their lands. Such lands—including plaintiffs'—are thus alleged to have been damaged in order to preserve or enhance the value of undisturbed land. This is the clearest of examples wherein our system functions "'to sacrifice the individual to the community, and it seems very difficult in reason to show why the [City of Tiburon] should not pay for property which it destroys or impairs the value . . . .'" (*Bacich* v. *Board of Control* (1943) 23 Cal.2d 343, 351 [144 P.2d 818].)

Recognizing the policy considerations in resolving the question when a "taking" must be paid for by government and when it may be deemed merely a permissible intrusion incident to governmental function, the United States Supreme Court has stated that a factual consideration "is the extent of the diminution [of property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." (*Pennsylvania Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 413 [67 L.Ed. 322, 325, 43 S.Ct. 158, 28 A.L.R. 1321].) What greater diminution can there be than where—as here—plaintiffs have alleged and the City of Tiburon has admitted that the ordinance complained of "has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . ."? We have said that the "underlying

---

[1]It is alleged by plaintiffs' complaint and admitted by the city's demurrer that the City of Tiburon has "the highest land value per acre for suburban areas in the State of California."

purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute through the community the loss inflicted upon the individual by the making of public improvements' [citation]; 'to socialize the burden . . . —to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' [citation]." (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) If those words have any meaning at all this must be the case where they are applicable—unless, of course, the majority deem they are not bound by the honored rule of law which prevents the court on a demurrer from finding factual matters contrary to matters well pleaded in the complaint.[2] (See, *Serrano* v. *Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

The majority opinion attempts to justify its judgment on the ground that plaintiffs—if they are entitled to relief at all—must look to some remedy other than inverse condemnation. (*Ante,* p. ___.) While purporting to recognize that the Fifth Amendment mandates "private property shall not be taken for public use, without just compensation," that the "'constitutional provision is addressed to every sort of interest the citizen may possess'" (*ante,* p. ___), and that "we cannot countenance the service of [the need of government to improve the quality of life] through the uncompensated destruction of private property rights" (*id.*), the majority refuse to follow these precepts. Their refusal is grounded on their mistaken analysis of this court's earlier decision in *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237].

---

[2]Conclusionary allegations of damage to property are insufficient to support—against a demurrer—a complaint in inverse condemnation. (See, *Hecton* v. *People ex rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653 [130 Cal.Rptr. 230].) Additionally, the particular facts of the case must be set out in the complaint. (*Id.*, at p. 657.) Plaintiffs have alleged with factual particularity the significant activities taking place prior to and constituting the inverse condemnation. They also allege the lack of remaining reasonable beneficial use resulting from these activities. (Cf. *Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328 [131 Cal.Rptr. 633].)

In *HFH* the majority held that inverse condemnation does not lie in a downzoning action when the complaint alleges mere reduction in market value. That case expressly stands for the proposition that a zoning ordinance which "merely decreased the market value of property" does not necessarily violate constitutional provisions "forbidding uncompensated taking or damaging" of property. (*HFH, Ltd.* v. *Superior Court, supra,* 15 Cal.3d 508, 518.) If, as the majority held in *HFH,* the difference between "merely decreasing" a property value on the one hand and "taking" a property interest on the other is one of degree, the majority today—in view of the admitted allegation that the ordinance "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever"—obliterate that distinction. Under today's holding inverse condemnation is no longer an available remedy—perhaps short of government actually dispossessing an owner—whatever the harshness of a zoning regulation. The distinction which the majority purport to carefully draw in *HFH* has been rejected and that case provides no support for today's decision.

Until today, this court has adhered to its rule that a harsh zoning regulation gives rise to inverse condemnation. (See *Klopping* v. *City of Whittier* (1972) 8 Cal.3d 39, 46 [104 Cal.Rptr. 1, 500 P.2d 1345].) The rule, moreover, is compelled by the Legislature: "The Legislature hereby . . . declares that this article [Open-Space Zoning] is not intended and shall not be construed, as authorizing the city . . . to exercise its power to adopt . . . an open-space zoning ordinance in a manner which will . . . damage private property for public use without the payment of just compensation therefor." (Gov. Code, § 65912; see also, Gov. Code, § 51073.) However, the majority reject the established rule and legislative direction in disapproving the recent case of *Eldridge* v. *City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575] (petn. for hg. den. July 15, 1976). That case involves a particularly harsh zoning ordinance. The court concluded, after a

detailed review of pertinent decisions, "that a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (*Id.*, at p. 621.) The "leading authority" relied on by the majority (*ante*, p. ____) is in agreement with *Eldridge*. (See, 1 Nichols on Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121; 2 Nichols on Eminent Domain (3d rev. ed. 1978) Taking and Damage, § 6.3, p. 6-65.)

When a zoning restriction is so harsh as to transcend a constitutionally protected property right is a question of fact to be determined by trial rather than by demurrer. (See *Wilkins* v. *City of San Bernardino* (1946) 29 Cal.2d 332, 338-339 [175 P.2d 542]; *Eldridge* v. *City of Palo Alto, supra*, 57 Cal.App.3d 613, 628.) Plaintiffs have well pleaded a cause of action in inverse condemnation, and should be afforded an opportunity to prove their allegations.

Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area. The majority argue we must condone greater intrusion; that we must recognize "changing attitudes toward the regulation of land use" (*ante*, p. ____); that community planners must be permitted the flexibility which their work requires (*ante*, p. ____); that the use of inverse condemnation "will have a chilling effect upon the exercise of police regulatory powers at a local level" and "'will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe'" (*id.*); and that enactment of a zoning

ordinance being essentially legislative process, courts should cease affording a legal remedy in inverse condemnation.[3]

Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation. While the majority of this court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. 393, 416 [67 L.Ed. 322, 326]; see also *Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 594 [8 L.Ed.2d 130, 134, 82 S.Ct. 987]; *Armstrong* v. *United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561, 80 S.Ct. 1563]; *U.S.* v. *Central Eureka Mining Co.* (1958) 357 U.S. 155, 168 [2 L.Ed.2d 1228, 1236, 78

---

[3]The majority's holding unnecessarily goes far beyond a mere determination that—in the majority's view—plaintiffs in this case are entitled to no relief. In the concluding portions of the majority opinion it is stated—although as earlier noted contrary to established rules on review of judgments following sustaining of demurrer—that the Tiburon ordinance does not deprive plaintiffs of "substantially all reasonable use" of their property (*Ante,* p. ___) Thus *HFH, Ltd.* v. *Superior Court, supra,* 15 Cal.3d 508, requires rejection of plaintiffs' claim because there has been a "mere diminution" of value as opposed to a taking of property, according to the majority. The majority's further assertion that inverse condemnation is no longer available to compensate an aggrieved landowner, appears to be—after more than a century of settled law to the contrary—obiter dicta. Such far-reaching pronouncement would be better left to another day and case wherein the issue is squarely presented and the parties have full opportunity to address it.

S.Ct. 1097]; *Berman* v. *Parker* (1954) 348 U.S. 26, 36 [99 L.Ed. 27, 39, 75 S.Ct. 98]; *U.S.* v. *Willow River Co.* (1945) 324 U.S. 499, 502 [89 L.Ed. 1101, 1107, 65 S.Ct. 761]; *Block* v. *Hirsch* (1921) 256 U.S. 135 [65 L.Ed. 865, 41 S.Ct. 458, 16 A.L.R. 165].) Lower federal court decisions are universally contrary to the majority opinion in this case. When the Richmond Redevelopment Agency urged that because it exercised police powers it did not have to pay just compensation to a landowner, the Ninth Circut [*sic*] held: "It is clear . . . that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects." (*Richmond Elks Hall Assn.* v. *Richmond Redevelopment* (9th Cir. 1977) 561 F.2d 1327, 1332; see also *Beneson* v. *United States* (Ct. Cl. 1977) 548 F.2d 939, 947; *Drakes Bay Land Company* v. *United States* (Ct.Cl. 1970) 424 F.2d 574, 584; *Dahl* v. *City of Palo Alto* (N.D.Cal. 1974) 372 F.Supp. 647, 648-649.)

The Supreme Court's latest expression of continuing adherence to the mandate of the Fifth and Fourteenth Amendments is contained in *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency* (1979) ___ U.S. ___ [59 L.Ed.2d 401, 99 S.Ct. ___]. In that case lands originally zoned as residential and commercial were rezoned by an interstate agency to allow limited residential use subordinated to public recreational use. Property owners claimed that the land use ordinance constituted inverse condemnation. The district court held that a cause of action for inverse condemenation [*sic*] was sufficiently alleged but that the action could not be maintained against the interstate agency, and that individual members of the agency were immune from suit. The court of appeals held that the interstate agency was federal in character, that the agency was therefore immune under the Eleventh Amendment, and that individual members of the agency were also immune. The Supreme Court answered by holding a cause of action was properly alleged, and that the interstate agency was neither federal in character nor immune, although individual agency

members were immune. While the court was primarily concerned with immunity issues, the sense of the holding is that an action in inverse condemnation lies for a taking brought about by land use regulation of the very nature involved in the instant case.

Particular areas of concern must be seen arising from today's decision. First, the majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties.

Perhaps of greater concern is the consequence that Tiburon—and many other govenmental [*sic*] agencies enacting similar land use plans—will price properties within their control out of reach of most people. Only the most wealthy will be able to afford purchase of and construction on lands in such areas. The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.

I reject the majority rationalization. It abdicates our responsibility to give meaning and substance to constitutional mandate.

Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision

not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment.

The judgment of dismissal should be reversed.

APPENDIX G

Unpublished Opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated June 26, 1979

COURT OF APPEAL - FOURTH DIST.
FILED
JUN 26 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

G-1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiff and Respondent, v. CITY OF SAN DIEGO, et al., Defendants and Appellants.	4 Civ. No. 16277 (Superior Court No. 357022)

APPEAL from a judgment of the Superior Court of San Diego County. Jack R. Levitt, Judge. Reversed.

The City of San Diego (City) appeals the judgment after the court found it had inversely condemned property owned by San Diego Gas & Electric Company (Company) which the jury valued at $2,886,300. Additionally, the jury found $283,696 severance damages. The court ordered interest of 7% to be paid on the total, $3,169,996, from the date of taking, June 19, 1973, plus appraisal, engineering and attorneys' fees totaling $122,559.07. After our original affirmance, the California Supreme Court granted a petition for hearing. The case has now been retransferred to us for reconsideration in light of *Agins v. City of Tiburon*, 23 Cal.3d 605.

The property is in Sorrento Valley in the northern part of the City, in the southwest quadrant of the intersection of Highway I-5 and Carmel Valley Road between I-5 and the Torrey Pines State Park; it is generally at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water or "ponding"; part is subject to ocean tidal action and portions have been referred to as the Los Penasquitos Lagoon, an estuary and wildlife refuge; a portion is within the State Coastal Act zone.

Company assembled the approximately 412-acre parcel in 1966 and then discussed with City its plan to hold part of the land for possible future construction of a power plant. In 1972 City initiated rezoning hearings for the property which was then zoned industrial (M-1A zone) and agricultural or holding zone (A-1-1); at that time the City General Plan Map designated most of the property as industrial and the remainder as "area for future growth." At the same time, the City Planning Department was preparing an open space plan for the city which ultimately was entitled "A Plan for the Preservation of Natural Parks for San Diego" and included about 230 acres of Company's land. In addition, in early 1973, the Community Development Department prepared a staff report entitled "Park Reserve Systems," which discussed the financing and acquisition of park reserve lands and got estimated values for the proposed park properties, including the property in question here, as part of a bond proposal to be put before the electorate in September 1973.

The City Council, on June 7, 1973, downzoned some of the land from industrial to A-1-10 and part of the A-1-1 land was designated for future industrial development; the rest of the land in the industrial zone

retained its industrial classification.[1] On June 19, 1973, City adopted the open space element of the general plan which covered all of the land found condemned here, about 233 acres. In September 1973 the report of the Community Development Department was received and this property appeared on maps as one of the properties to be acquired if the bond issue passed. It failed. A year later Company filed suit.

The City claims its acts in zoning the property for light industry and agriculture with an open space general plan designation do not constitute a taking or a damaging of property. Company claims City has inversely condemned its land because the zoning regulations combined with the open space element of the general plan has made the property useless.

The power of eminent domain is the state's inherent power to take private property for public use (*Rose v. State of California,* 19 Cal.2d 713, 719). However, the state is limited in exercising this power by Article I, section 19 of the California Constitution which assures the private landowner he will be compensated if his land is taken or damaged.

The state derives its authority to zone property from the police power, the government's power to enact regulations to protect the health, safety and welfare of its citizens. Unlike the person whose

---

FOOTNOTE 1: From 1966-1973 the property was zoned:

Industrial (M-1A)	116 acres
Agricultural (A-1-1)	112 acres
Agricultural holding zone	

After the rezoning the land was classed as:

Industrial (M-1A)	77 acres
Agricultural (A-1-10)	39 acres
Agriculatural [*sic*] holding zone (A-1-1) with 50 acres to be considered for future industrial use.	112 acres

property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530). In California the general rule is that a rezoning which reduces the market value of the land does not give rise to a cause of action in inverse condemnation (*HFH, Ltd, v. Superior Court,* 15 Cal.3d 508, 514). A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus (*Agins v. City of Tiburon, supra,* 23 Cal.3d 605, 611).

Company complains it has been denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan. It has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies asserting that City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally. However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions. They can be dealt with anew should Company elect to retry the case.

The judgment is reversed.

Brown
P.J.

WE CONCUR:

Cologne
J.

Stanford
J.

APPENDIX H

Denial of Petition for Rehearing by the California Court of Appeal, Fourth Appellate District, Division One, dated July 9, 1979

H-1

COURT OF APPEAL - FOURTH DIST.
FILED
JUL 9 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,
Plaintiff-Respondent,
vs.
CITY OF SAN DIEGO, ETC., ET AL,
Defendants-Appellants.

4 Civil No. 16277

SUPERIOR COURT NO. 357022

BY THE COURT:

The petition for rehearing is denied.

Brown
Presiding Justice

Copies to: Luce, Forward, Hamilton & Scripps-SD
C. Alan Sumption, Esq.-SD
Zumbrun & Hookano-SAC
Attorney General-SD
Attorney General-SF
Superior Court-SD

APPENDIX I

Denial of Petition for Hearing by California Supreme Court, dated August 22, 1979

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 27 1979

I have this day filed Order

In re: 4 Civ. *No.* 16277

San Diego Gas & Electric Co.

vs.

City of San Diego

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

APPENDIX J

Notice of Appeal

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 3 - 1979
ROBERT L. FORD, Clerk
DEPUTY CLERK

J-1

4 Civil 16277

(Superior Court,
San Diego County
No. 357022)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff and Appellant,

vs.

CITY OF SAN DIEGO, etc., et al.,

Defendants and Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF UNITED STATES

Louis E. Goebel
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West "A" Street
San Diego, California 92101
(714) 236-1414

Attorneys for Plaintiff and
Appellant San Diego Gas &
Electric Company

4 Civil 16277

(Superior Court,
San Diego County
No. 357022)

COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff and Appellant,

vs.

CITY OF SAN DIEGO, etc., et al.,

Defendants and Appellees.

NOTICE IS HEREBY GIVEN that SAN DIEGO GAS & ELECTRIC COMPANY, Plaintiffs and Appellants above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered in this action on August 22, 1979, denying hearing after decision by the Court of Appeal, Fourth Appellate District.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: October 3, 1979

Respectfully submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS

By _____

Louis E. Goebel, Attorneys
for Plaintiff and Appellant
San Diego Gas & Electric Company

APPENDIX K

(1) Constitutional Provisions

(2) Statutes

(3) Ordinances and Resolutions

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTES

California Government Code Sections 6950-54

§ 6950. Legislative intent

It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.
Added Stats. 1959 ch 1658 § 1.

§ 6951. Legislative findings

The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.
Added Stats 1959 ch 1658 § 1.

§ 6952. Necessity for sound and proper urban and metropolitan development

The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.
Added Stats 1959 ch 1658 § 1.

§ 6953. Acquisition of interests or rights in real property for preservation of open spaces and areas of public purpose

The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual

right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.
Added Stats 1959 ch 1658 § 1.

§ 6954. "Open space" or "open area"

For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.
Added Stats 1959 ch 1658 § 1.

California Government Code Sections 65910-12

§ 65910. Preparation and adoption of ordinance

Every city and county by December 31, 1973, shall prepare and adopt an open-space zoning ordinance consistent with the local open-space plan adopted pursuant to Article 10.5 (commencing with Section 65560) of Chapter 3 of this title.

§ 65911. Variances from ordinance

Variances from the terms of an open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.

§ 65912. Legislative intent as to compensation for taking or damaging property

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a matter which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.
Added Stats 1970 ch 1590 § 16.

California Government Code Sections 65560 *et seq.*

§ 65560. Definitions

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the managment of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access

to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

§ 65561. Declaration of legislative findings and policy

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.

§ 65562. Declaration of legislative intent

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.

§ 65563. Local open-space plans: Preparation, adoption, and submission

On or before December 31, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction. Every city and county shall by August 31, 1972, prepare, adopt and submit to the Secretary of the Resources Agency, an interim open-space plan, which shall be in effect until December 31, 1973, containing, but not limited to, the following:

(a) The officially adopted goals and policies which will guide the preparation and implementation of the open-space plan; and

(b) A program for orderly completion and adoption of the open-space plan by December 31, 1973, including a description of the methods by which open-space resources will be inventoried and conservation measures determined.

§ 65566. Acquisition, regulation, etc., of open-space land to conform to plan

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

§ 65567. Requirements as to building permits, subdivision maps, and zoning ordinances

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

California Government Code Section 65302

§ 65302. Statement of development policies: Inclusion of diagram and text setting forth objectives, etc.; Elements to be included

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

. . . .

(e) An open-space element as provided in Article 10.5 (commencing with Section 65560) of this chapter.

ORDINANCES AND RESOLUTIONS

RESOLUTION NO. 207761

A RESOLUTION DETERMINING THAT THE PUBLIC INTEREST AND NECESSITY DEMAND THE ACQUISITION, CONSTRUCTION OR COMPLETION OF CERTAIN MUNICIPAL IMPROVEMENTS AND MAKING FINDINGS RELATING THERETO.

BE IT RESOLVED , by the Council of The City of San Diego as follows:

Section 1. That the public interest and necessity demand the acquisition, construction or completion by The City of San Diego of a certain municipal improvement, to wit: to improve, develop and expand the parks and recreational services of the City. The estimated cost of this municipal improvement is the sum of Twenty-five Million Dollars ($25,000,000.00).

Section 2. The public interest or necessity demand the acquisition, construction or completion by The City of San Diego of a certain municipal improvement, to wit: to enhance the environment by the acquisition and improvement of park reserve in the City of San Diego, said park reserve areas to be acquired to be subsequently identified. The estimated cost of this municipal improvement is Twenty-two Million Five Hundred Thousand Dollars ($22,500,000.00). In incurring any general obligation bonded indebtedness to finance the purchase of said park reserve areas, The City of San Diego shall pledge in payment of principal and interest thereon two thirds of the Environmental Growth Fund created by Charter vote of the people for that purpose.

Section 3. The cost of each of the foregoing municipal improvements and the principal amount of the bonded indebtedness proposed to be incurred are and will be too great to be paid out of the ordinary annual income and revenue of the City and will require an expenditure greater than the amount provided by the annual tax levy.

Section 4. Each of the foregoing municipal improvements is necessary and convenient to carry out the objects, purposes and powers of The City of San Diego.

Section 5. This Council intends to submit to the qualified voters of the City at a special municipal bond election to be held in the City on September 18, 1973, and to be consolidated with the Municipal Primary Election to be held on the same date, two (2) propositions for the issuance of general obligation bonds of the City, all of such bond issues being in the principal amount of the estimated cost of each municipal improvement, as recited in this resolution.

APPROVED: JOHN W. WITT, City Attorney

By Peter D. Bulens, Deputy

4/17/73

K-10

RESOLUTION NO. 208180

WHEREAS, the State Planning and Zoning Law requires that the City Council adopt an open space plan prior to June 30, 1973; and

WHEREAS, the Planning Commission held public hearings on May 16 and May 23, 1973, for the purpose of considering an open space plan; and

WHEREAS, the Planning Commission, by Resolution No. 190, adopted May 23, 1973, approved said open space plan and recommended its adoption to the City Council; NOW, THEREFORE,

BE IT RESOLVED, by the Council of The City of San Diego, as follows:

This Council hereby adopts that open space plan described in the Report entitled, "A Plan for the Preservation of Natural Parks for San Diego," on file in the office of the City Clerk as Document No. 743797.

APPROVED: JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad, Chief Deputy

6-13-73

Passed and adopted by the Council of The City of San Diego on JUN 19 1973, by the following vote:

Councilmen	Yeas	Nays	Excused	Absent
Gil Johnson	☑	☐	☐	☐
Maureen F. O'Connor	☑	☐	☐	☐
Henry L. Landt	☑	☐	☐	☐
Leon L. Williams	☑	☐	☐	☐
Floyd L. Morrow	☑	☐	☐	☐
Bob Martinet	☑	☐	☐	☐
Allen Hitch	☑	☐	☐	☐
Jim Bates	☑	☐	☐	☐
Mayor Pete Wilson	☐	☐	☐	☑

RECEIVED
CITY CLERK'S OFFICE
1973 JUN 13 PM 2:55
SAN DIEGO, CALIF.

AUTHENTICATED BY:

PETE WILSON
Mayor of The City of San Diego, California.

EDWARD NIELSEN
City Clerk of The City of San Diego, California.

By Mary Anne Inman, Deputy.

Office of the City Clerk, San Diego, California

Resolution Number 208180 Adopted JUN 19 1973

ORDINANCE NO. 11088 JUNE 21, 1973
(New Series)

AN ORDINANCE INCORPORATING PORTIONS OF PUEBLO LOTS 1335, 1336, 1338, 1339, 1340, AND 1362: AND A PORTION OF SECTION 25, TOWNSHIP 14 SOUTH, RANGE 4 WEST, S.B.B.M., IN THE CITY OF SAN DIEGO, CALIFORNIA, INTO A-1-10 ZONE, AS DEFINED BY SECTION 101.0404 OF THE SAN DIEGO MUNICIPAL CODE, AND REPEALING ORDINANCE NO. 10936 (NEW SERIES), ADOPTED OCTOBER 5, 1972, ORDINANCE NO. 13455 APPROVED FEBRUARY 15, 1932, AND ORDINANCE NO. 5591 (NEW SERIES), ADOPTED MAY 19, 1953 OF THE ORDINANCES OF THE CITY OF SAN DIEGO INSOFAR AS THE SAME CONFLICT HEREWITH.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That portions of Pueblo Lots 1335, 1336, 1338, 1339, 1340, and 1362; and a portion of Section 25, Township 14 South, Range 4 West, S.B.B.M., in the City of San Diego, California, within the boundary of the district designated "A-1-10" on Zone Map Drawing No. C-377.3, filed in the office of the City Clerk under Document No. 743345 be, and they are hereby incorporated into A-1-10 Zone, as such zone is described and defined by Section 101.0404 of the San Diego Municipal Code.

Section 2. That Ordinance No. 10936 (New Series), adopted October 5, 1972, Ordinance No. 13455 approved February 15, 1932, and Ordinance No. 5591 (New Series), adopted May 19, 1953, of the Ordinances of The City of San Diego be, and the same are hereby repealed insofar as they conflict herewith.

Section 3. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: JOHN W. WITT, City Attorney

By Frederick C. Conrad
Frederick C. Conrad, Chief Deputy